

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

HARRISON B.,

Claimant,

vs.

REGIONAL CENTER OF THE
EAST BAY,

Service Agency.

OAH No. N 2007030503

DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter in Concord, California, on April 24, 2007.

Claimant's parents, Sean B. and Jill B., represented Claimant, who was not present.

Pamela Higgins, Fair Hearing Specialist, represented Service Agency Regional Center of the East Bay (RCEB).

The record closed on April 24, 2007.

ISSUES

1. Whether Claimant's diagnosis of Asperger's Disorder, a condition on the Autism Spectrum, qualifies Claimant for regional center services.

2. Whether Claimant is eligible for regional center services because he suffers from a substantial developmental disability that is closely related to mental retardation or that requires treatment similar to that required by the mentally retarded.

FACTUAL FINDINGS

Background information

1. Claimant, born April 17, 2000, is seven years of age. He resides with his parents and three-year-old sister in the family home. Claimant has been attending Marchus School since January and is in the first grade. He receives special education services based upon the school district's finding that he suffers from an "autistic-like condition." Brentwood Unified School District personnel referred Claimant's parents to RCEB.

Claimant's parents applied to RCEB on his behalf. RCEB found Claimant not eligible, he appealed and this hearing followed. As reason for requesting a fair hearing, his parents wrote the following on the request form: "[Claimant] meets the 'Autism' diagnosis under Asperger's Disorder which is under the 'Autism Spectrum,' and he is certainly 'developmentally disabled.'"

2. Claimant was born following a full-term pregnancy and there were no complications. Developmental milestones were within normal limits. Claimant's parents first became concerned at about age three and one-half because of the speech patterns and behaviors Claimant exhibited interacting with others. He was provided a 1:1 aide during his last year at pre-school, then moved on to kindergarten at Loma Vista Elementary. He was provided an aide there as well and also received speech and occupational therapy. In first grade, there were problems with staffing, including providing an aid who was a "good fit" for him. Problems at school increased. Claimant was acting out in numerous ways. He was transferred to Marchus School in 2007, a non-public school whose population includes students who are emotionally disturbed. School records state that the reason for the transfer was to meet his behavioral needs.

Claimant was diagnosed with Asperger's Disorder by a developmental pediatrician when he was four years old. On another occasion, a psychiatrist diagnosed him with Obsessive Compulsive Disorder and Anxiety Disorder.

RCEB evaluation

3. An RCEB eligibility team evaluated Claimant's application. The members of the team included an assessment counselor, a psychologist and a physician. Each member evaluated Claimant within his or her area of expertise.

4. Marguerita Izquiereo is an assessment counselor with RCEB. She compiled information concerning Claimant's history in the following categories: family, pregnancy, developmental, educational and health. Izquiereo also assessed Claimant's current level of functioning, including the domains of motor, independent living, social, emotional, cognitive and communication. She visited the family home, observed Claimant and interacted with

him. Izquirdo opined that Claimant needs an intensive behavior program and has a lot of cognitive potential if stimulated appropriately.

5. Larissa Terry, Psy.D, is a licensed psychologist and a board-certified behavioral analyst. She has many years of experience in autism spectrum disorders and is a clinical psychologist with RCEB's intake and assessment unit. Dr. Terry reviewed Claimant's records and conducted an assessment. She also conducted some testing. Dr. Terry did not observe Claimant in the school setting, nor did she perform a complete assessment herself. On December 4, 2006, Dr. Terry issued a 14-page written report of her findings that is thorough, thoughtful and persuasive.

The intelligence testing that Dr. Terry conducted was consistent with previous testing results. Claimant's IQ scores on the Stanford-Binet Intelligence Scale – Fifth Edition were: Full Scale IQ 86; Nonverbal IQ 96; and Verbal IQ 78. These scores are in the low-average range of intelligence. Dr. Terry pointed out that a Nonverbal IQ of 96 is within the average range and is “a better indicator of his long-term functioning potential.”

Dr. Terry opined that Claimant suffers from a great deal of anxiety at present, but is not globally delayed. She agrees with the diagnosis of Asperger's Disorder. Claimant does appear to be exhibiting more rigid behaviors at this time, but this means that he needs a better behavioral plan, which is the responsibility of his school. Similarly, his anxiety requires assistance from mental health providers.

6. Paul Fujita, M.D., is a pediatrician with RCEB. He based his conclusions on documents that he reviewed. Dr. Fujita believes that Claimant's primary presenting problem is an autism spectrum disorder with co-morbid behavioral problems that are rooted in mental health issues. Claimant's cognitive abilities are higher than a mentally retarded individual. Claimant's problem is not that he does not understand a task or that he is unable to learn it, but that his behaviors interfere with his accomplishment of the task. Dr. Fujita noted that although Claimant meets the criteria for Asperger's Disorder, his intellectual and adaptive functioning is within average range. In other words, Claimant has a developmental disability but is not substantially handicapped by it.

7. Barbara Scapelitte is the supervisor of the intake and assessment unit at RCEB. She personally reviews every application for eligibility. Scapelitte acknowledges that Claimant suffers from Asperger's Disorder, but believes that the functioning problems that he currently is experiencing are rooted in mental health issues. She opines that if the behaviors could be successfully addressed therapeutically, Claimant could advance consistent with his intellectual abilities.

Claimant's evidence

8. Claimant's parents each testified in support of their position that Claimant is eligible for services. Sean B. is Claimant's father. He asserts that he has observed many

facts about Claimant that are “not in the record.” He is also concerned that Claimant’s school records are not accurate, and that this has affected RCEB’s opinion.

Sean B. feels that Claimant is experiencing a mental difficulty that is “not letting him say yes or no.” Claimant will appear frozen when asked to do something, choose or speak. The family calls this Claimant’s “brain bug,” and they are very worried about it. Sean B. believes that Claimant may have dyspraxia (impairment of the ability to perform coordinated movements), and he is being evaluated for that condition. In addition, Sean B. believes that Claimant now meets the diagnostic criteria for Autistic Disorder in that he is more withdrawn, does not reciprocate, has no friends and “parallel plays.” He also testified that an expert has recently opined that Claimant does not suffer from Obsessive Compulsive Disorder, but presented no report or other evidence regarding this assertion.

9. Jill B. is Claimant’s mother. She described Claimant’s current medication regimen, which includes Ativan, Zyprexa and lithium. His medications are managed by Dr. Michael Levin, Medical Director, East Bay Psychopharmacology Group. Dr. Levin recently stopped prescribing BuSpar, as Claimant was becoming more agitated.

Jill B. believes that Claimant has regressed since she previously answered questions and filled out questionnaires about his functioning. For example, his deviant-type behaviors have increased. Claimant now insists that extensive rituals be followed regarding eating, toileting and other activities. Also, he does not seem to enjoy activities or toys that he formerly enjoyed.

10. RCEB services sought by the parents include respite, a “mother’s helper,” help with the “brain bug” problem, vouchers for tutoring, camp and training for parents of children with developmental disorders.

11. Joyce Ash was Claimant’s classroom aide at his previous school. Currently, Claimant’s parents employ her to help in the home one day each week. Ash clearly knows Claimant well, and she testified about her observations of him.

During the past year Ash has observed that Claimant does not enjoy activities that he previously was interested in. He looks to her more often for reassurance and directions. Claimant had been progressing in writing and reading, but this has slowed. He needs more repetition. Writing and drawing used to be activities that he enjoyed and that would be “calming.” Now, he appears to struggle to be involved in activities. Ash has to prompt Claimant to eat, including prompting him to pick up his food and put it in his mouth.

12. Denise Martin has known Claimant since birth. She describes him as a bright and articulate boy who has noticeably regressed in the past six months. His repetitive behaviors have increased. Martin has observed Claimant’s parents struggle with caring for Claimant.

13. A Multidisciplinary Assessment Report was issued by Samantha Chelson, M.A., Ed. Psy., a school psychologist, on April 17, 2007. The reasons for the referral were “concerns related to eligibility, behavior and cognitive functioning.” Dr. Chelson reviewed previous evaluations and reports and administered testing. She observed Claimant in his home for two hours, and her conclusions include information about functioning both at home and at school. The report contains a great amount of detail about Claimant’s functioning in the two environments of home and school. Dr. Chelson found that Claimant “shows significant deficits in language, social and maladaptive behavior as rated from both home and school. He also shows deficits in cognitive and sensorimotor skills at home, but not at school.” Most noteworthy in this report are descriptions of Claimant’s behavior and use of language.

Claimant’s present teacher, Kathi Sanchez, told Dr. Chelson that Claimant:

Requires/demands “help” with everything from eating to walking from one area of the room to another, including sitting him in a chair - which he may need to do repetitiously (3-4 times) before he can stay seated. [Claimant] frequently taunts or teases other students; taps or touches them in a teasing manner, throws their personal belongings. He often speaks as if he is the adult in charge, then when he accepts that he is not, he begins negotiating for what he wants. When negotiation fails, he often screams and cries. [Claimant] doesn’t seem to have any friends in class, although other students do reach out to him by trying to play with him or “help” him. In regards to classroom performance, [Claimant] is joining more in circle and small group instruction. It is noted that [Claimant] can perform, but does not perform most motor skills (fine or gross) and demands/requires “help” for such simple tasks as picking up his sandwich and guiding it to his mouth - although he has no physical limitations.

Dr. Chelson described her home visit to Claimant in her report. She found him to be:

Attentive and polite throughout the first forty five minutes of the session. He smiled often at this examiner and gave a hug. [Claimant] had some good learning strategies such as repeating questions to himself, asking for repetition, and asking how to do things. When he did not know an answer he would say, “this one’s too tricky, let’s skip this one” or “I’m not sure what to do.”

After 45 minutes passed, Claimant became restless and unfocused. He got up from his seat frequently and walked the perimeter of the room. He engaged in ritualistic-type

behaviors, for example, insisting that Dr. Chelson tap his hand. When it was time for her to leave, Claimant's behavior deteriorated further.

When walking down the hall to the door, [Claimant] grabbed onto this examiner's arms, saying, "no, please, don't go Miss Sam . . . seven more minutes." Once outside the front door, [Claimant] began to scream, cry, throw himself on the ground, and run after me while saying, "You said ten minutes, you said I could give you a hug, please don't go." At this time, [Jill B.] had to physically restrain [Claimant] so that he would not run out into the street after this examiner.

LEGAL CONCLUSIONS

1. The governing law is found in Welfare and Institutions Code section 4500 et seq., commonly known as the Lanterman Act. At section 4501 the Legislature declares the State of California's responsibility for persons with developmental disabilities. In *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, the Supreme Court stated that the purpose of the Act:

. . . is two-fold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.

2. The Act does not apply to every citizen who suffers a physical or mental handicap and is in need of assistance. Rather, a person must meet specific criteria as described in Welfare and Institutions Code section 4512, subdivision (a):

"Developmental disability" means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual . . . this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

3. The Act defines substantial disability in Welfare and Institutions Code section 4512, subdivision (l):

“Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning
- (4) Mobility
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

4. A developmental disability not resulting from one of the four listed conditions (Welf. & Inst. Code § 4512, subd. (a)) is commonly called the “fifth category.” Eligibility exists in this category despite normally disqualifying IQ scores where it is shown that an individual is in fact functioning at an adaptive and cognitive level as if he or she were mentally retarded, and/or that the treatment he or she requires is consistent with that needed by a mentally retarded individual. It is not necessary that an applicant present as if mentally retarded in every aspect. However, the condition must also meet the other requirements of the Act, that is, it must be substantially disabling and it must have originated prior to age 18.

5. Additional information regarding eligibility is found in California Code of Regulations, title 17, section 54000, subdivision (c). It provides that where the handicapping condition is solely physical in nature and not associated with neurological impairment, is solely due to a psychiatric disorder, or consists solely of learning disabilities, it is not a developmental disability for the purposes of the Lanterman Act.

Discussion

6. In this proceeding, the burden of proof is on Claimant to demonstrate that he is eligible for regional center services. Whether the eligibility is based upon a qualifying diagnosis or upon the “fifth category,” the condition must be substantially disabling. RCEB utilized professionals to conduct a multi-disciplinary evaluation of Claimant’s conditions and functioning. The conclusion reached by the team was that he suffers from a developmental disability, but that it is not a substantial disability.

Claimant’s evidence was insufficient to demonstrate that RCEB’s evaluation was incorrect. In essence, his evidence was that his parents disagreed with RCEB’s conclusions regarding the severity and source of his problems (except for the diagnosis of Asperger’s Disorder) and believe that Claimant is getting worse. Claimant presented no expert opinion evidence directly addressing the main issues. Dr. Chelson’s report confirmed Claimant’s continuing need and eligibility for special education services due to, primarily, behavioral issues.

Given the conclusion of lack of substantial developmental disability, the questions of whether Asperger's Disorder is a qualifying disorder because it is on the autism spectrum, whether Claimant has a condition similar to mental retardation, and whether Claimant requires treatment similar to that provided the mentally retarded are not addressed.

7. There is no question that Claimant is a troubled boy who needs services and supports. But the Lanterman Act does not cover every handicapping condition – it applies only to those who are substantially disabled by either: a particular developmental disability, a condition similar to mental retardation or a condition requiring treatment similar to that needed by the mentally retarded. There are many unanswered questions regarding Claimant. He is clearly having significant and disturbing problems and the evidence demonstrated that they are worsening. Persuasive expert evidence attributes Claimant's behavior problems to mental health needs. If he receives appropriate treatment, Claimant could improve and this might mean that he does not have the global, life-long deficits of a developmentally delayed individual. If, on the other hand, Claimant actually has Autistic Disorder, as his father now suspects, and his condition meets the other requirements, he would be eligible for regional center services. But the evidence produced at this hearing was insufficient to establish eligibility.

ORDER

Claimant Harrison B's appeal is denied. He is not eligible for regional center services at this time.

DATED: _____

MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.